IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY BACONE	:	CIVIL ACTION
v.	:	No. 01-CV-419
PHILADELPHIA HOUSING AUTHORITY, et al.	:	

O'Neill, J. May , 2003

MEMORANDUM

I. INTRODUCTION

Plaintiff Stanley Bacone, a PHA Police Officer, and his wife Judy Bacone sued the Philadelphia Housing Authority for violation Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq, and Angela Allen, a former PHA Police Officer, and Tony Miller, a former PHA Police Sergeant for various state law claims.[1] Plaintiff Judy Bacone and defendant Angela Allen previously have been dismissed as parties. See Bacone v. Philadelphia Housing Auth., No. 01-CV-419, 2001 WL 748177, at *7 (E.D. Pa. June 27, 2001). Presently before me is the remaining defendants' motion for summary judgment. For the reasons stated below I will grant defendants' motion on the Title VII claims and dismiss the remaining state law claims without prejudice.

[1] I exercise federal question jurisdiction over plaintiff's Title VII claims against PHA. See 28 U.S.C. 1331. I have supplemental jurisdiction over the remaining state claims against PHA and Miller. See 28 U.S.C. 1367.

II. BACKGROUND

Plaintiff alleges that Bacone was subjected to hostile work environment discrimination and retaliation while employed by the PHA Police Department. Count I of the complaint alleges that PHA violated Title VII by providing a hostile work environment and subsequently retaliating against plaintiff. Count II alleges that PHA discriminated against plaintiff in violation of Section 955(e) of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons.Stat.Ann. § § 951 et seq. (West 1991 & Supp.2000). Count III alleges Miller violated section 955(e) of the PHRA.[2] Count IV alleges that PHA and Miller aided and abetted the harassment practices of Allen in violation of the PHRA.

Officer Allen is alleged to have committed several acts of sexual harassment against Officer Bacone, including exposing her breasts to him in public, making uninvited physical contact with his person and making repeated and suggestive requests that Bacone "go home" with her. In addition to direct incidents of harassment, Bacone also alleges that unwelcome sexual comments made by Allen to other department police officers contributed to a hostile work environment at the PHA. The first alleged act of sexual harassment took place in a radio patrol car while Bacone and Allen were on duty on March 5, 1998. The alleged acts of harassment continued until March 19 of that year.

On three occasions Bacone reported Allen's alleged acts of harassment to Miller, who had supervisory authority over Bacone and Allen. It is alleged that Miller did not take action to eradicate the hostile work environment purportedly created by Allen. However, on March 19, 1998 plaintiff complained about Allen's actions to Sergeant Tamburrino and Tamburrino told

[2] Count III also alleged that Allen had violated section 955(e).

plaintiff that he would no longer schedule Bacone to work with Allen. Only after Bacone filed a written report of Allen's behavior with PHA officials superior to Miller did the PHA begin an investigation of the matter. The investigation was conducted by then-Captain Rosenstein of the PHA police. No action was taken against Allen following the investigation, and Bacone claims that following the investigation he was transferred to a dead-end desk job and harassed with unfounded disciplinary charges as retaliation for asserting the hostile work environment claim. Bacone made a joint filing of his charges against Allen, Miller, and the PHA with the Pennsylvania Human Relations Commission ("PHRC") and the EEOC on July 28, 1998. The PHRC returned a finding of cause letter to Bacone on or about April 19, 1999, confirming there was probable cause to credit his allegations of unlawful discrimination based on his sex by Miller and the PHA.[3] Following receipt of the letter, Bacone attempted to obtain a public hearing on his charges through the administrative procedures of the PHRC. The hearing was canceled when Bacone refused to accept a remedy proposed by the PHA that the PHRC deemed appropriate. Bacone then filed his complaint in this Court.

III. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has recognized that the

[3] The PHRC found that Allen's actions were not sufficient to constitute a violation of Section 5 of the PHRA as she was Bacone's non-supervisory co-worker. However, her conduct was deemed sufficient to support a finding of probable cause against Miller and the PHA.

moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party, to prevail, must make a showing sufficient to establish the existence of every element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The nonmoving party may not simply rest upon the allegations or denials of the party's pleading. See id. at 324.

I must determine whether any genuine issue of material fact exists. An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

IV. DISCUSSION

A. Sexual Harassment / Hostile Work Environment Claim

Defendant PHA has moved for summary judgment on the basis that plaintiff has failed to

allege sufficiently severe or pervasive harassment so as to alter a term of his employment.[4] Under Title VII and the PHRA it is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin. Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 425 (3d Cir. 2001), citing 42 U.S.C. § 2000e-2(a)(1).[5] The Court of Appeals has set forth the five elements that a plaintiff must establish to assert a successful hostile work environment claim against his or her employer: (1) the employee suffered intentional discrimination because of his or her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) *respondeat superior* liability existed. Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997).

In Meritor Savings Bank v. Vinson, 477 U.S. 57,(1986), the Supreme Court first recognized claims for hostile work environment sexual harassment under this provision of Title VII. However, the Court emphasized that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." Id. at 67. Rather, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. (internal quote omitted).

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[4] PHA also moves for summary judgment for the hostile work environment claim on the basis that it is not liable on the basis of *respondeat superior*. Because I find that the alleged harassment was not pervasive or severe, I need not address *respondeat superior* liability.

[5] The Court of Appeals has recognized: "The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably." Weston, 251 F.3d at 426 n.3.

The Court elaborated on this standard in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). To be actionable under Title VII, the work environment must be both objectively and subjectively offensive. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Id. at 21-22. In determining whether a work environment is objectively hostile, courts are required to examine "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23. The conduct at issue "must be extreme to amount to a change in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). "In short, what is illegal is a 'hostile work environment,' not an 'annoying work environment'." Lynch v. New Deal Delivery Serv. Inc., 974 F. Supp. 441, 452 (D.N.J.1997).

Plaintiff has not demonstrated that a genuine issue of material fact exists as to whether PHA illegally subjected him to a hostile work environment caused by sexual harassment. In the present case, taking all the evidence in a light most favorable to the plaintiff, a jury could not conclude from the totality of the circumstances that Bacone objectively experienced pervasive or severe harassment that unreasonably interfered with his work.

The alleged harassment was not pervasive. Plaintiff has not produced any evidence that the alleged harassment, occurring over such a short period of time, pervaded his workplace so as

to interfere unreasonably with his duties as a PHA police officer.[6] In his deposition, plaintiff testified generally that Allen sexually harassed him for approximately one month, from March 5, 1998 until April 6, 1998, when he filed his formal written complaint. However, the evidence clearly shows that plaintiff did not work with Allen on a regular basis during this period of time. Aside from two instances when PHA specifically assigned Bacone and Allen to work together in the same location on March 5, 1998 and March 19, 1998, it appears that Officers Bacone and Allen often worked in different areas of the city with little or no contact. In his deposition, plaintiff testified to four specific incidents that occurred over a two-week period from March 5, 1998 to March 19, 1998. The first incident occurred on March 5, 1998 when Bacone and Allen were driving in a patrol car together and she grabbed his groin. He immediately told her to stop. On March 11, 1998 when the two again were riding in same car she badgered him about when he

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[6] Bacone sought counseling two and a half years after the alleged harassment took place. He points to a treatment report by his license clinical social worker as evidence of how the alleged harassment by Allen affected his job performance:

> Mr. Bacone felt that his coworkers were unsupportive and malicious in response to his allegations of sexual harassment against a fellow police officer. He felt that he was punitively reassigned to desk jobs in retaliation against his allegations. These job transfers affected his self-esteem and his self-confidence as a police officer, which in turn, were affecting his relationship with his wife. Mr. Bacone had a difficult time accepting that his future career as a police officer was being compromised. He felt confused about what he was going to do with his professional career, and several sessions focused on helping Mr. Bacone to seek a different vocation.
>
> It is my professional opinion Mr. Bacone's symptoms were a direct result of work related stress.

(Pl.'s Ex. 37.)

Although the report demonstrates that Bacone was emotionally hurt by his coworkers' unsupportive response to his allegations of sexual harassment, it provides no evidence as to how the actual harassment by Allen affected his job performance.

was "going to go home with her."[7] Later that evening, he saw her sitting in her car, staring at him, which made him uncomfortable. The next incident occurred on March 14, 1998, when she briefly exposed her breasts to him after he refused to join her and her sister for a drink after work.[8] Thereafter, on March 19, 1998, she embarrassed him in front of at least one other officer by calling him profane names.[9] On March 19, 1998, after plaintiff complained about Allen's actions to Sergeant Tamburrino, Tamburrino told plaintiff that he would no longer schedule Bacone to work with Allen. Moreover, plaintiff admits that after he filed his formal complaint on April 6, 1998 all harassment ceased. The evidence demonstrates that plaintiff had sporadic contact with Allen over the course of approximately two weeks and PHA prevented the alleged harassment from escalating to the point where it may have become pervasive by preventing any further scheduling of Bacone and Allen together.

Beyond the lack of pervasiveness, few if any of the incidents plaintiff describes reasonably could be construed as "severe." Most of Allen's actions were "mere offensive utterances." See Faragher, 524 U.S. at 787-88. Because Allen was not Bacone's superior (in fact she was a new graduate from the police academy) and because they rarely worked in close proximity, such offensive language cannot be characterized as "severe." Cf. Quantock v. Shared

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[7] It appears that Bacone and Allen were not assigned to work together on this day. Instead, Allen and another officer were required to transport Bacone back to the station.

[8] Allen stopped by the booth where Bacone was working. She was done working for the day and in civilian clothes at this point.

[9] There are a few other verbal incidents that occurred at unspecified times where Allen 1) asked plaintiff if he thought that she was "sexy," 2) declared to him that she was going to have sex with him on a couch in a satellite police station, and 3) told another female officer that he had large genitals.

Marketing Services, Inc., 312 F.3d 899, 904 (7th Cir. 2002) (holding that when a defendant is plaintiff's superior and works with plaintiff in close quarters, a reasonable jury could find sexual propositions sufficiently "severe"). Although the one incident of offensive touching and one incident where Allen briefly exposed herself to Bacone were reprehensible, they were not severe so as to alter a term of his employment. See, e.g., Bowman v. Shawnee State Univ., 220 F.3d 456 (6th Cir.2000) (affirming grant of summary judgment; incidents where superior rubbed employee's shoulders, grabbed employee's buttocks, and placed finger on employee's chest were not sufficiently severe or pervasive to create a hostile work environment); Adusumilli v. City of Chicago, 164 F.3d 353 (7th Cir.1998) (affirming grant of summary judgment; incidents where co-employees teased plaintiff, made sexual jokes aimed at her, repeatedly stared at her chest, and on four occasions made unwelcomed contact with her arm, fingers, and buttocks were not sufficiently severe or pervasive to create a hostile work environment); Saidu-Kamara v. Parkway Corp., 155 F. Supp. 2d 436, 438 (E.D. Pa. 2001) (granting summary judgment where defendant ask plaintiff out on dates on several occasions, directed sexual innuendo toward her, and, at least one time, touched her breasts and buttocks); Seldomridge v. Uni-Marts, Inc., No. CIV A 99-469, 2001 WL 771011, *8 (D. Del. July 10, 2001) (granting summary judgment where male supervisor surprised female employee by posing nude in doorway to storage room); Bonora v. UGI Utilities, Inc., No. CIV.A. 99-5539, 2000 WL 1539077, 4 (E.D. Pa. Oct. 18, 2000) (granting summary judgment where defendant touched plaintiff's waist on one occasion; brushed his buttocks against hers on two to four occasions; and looked at her chest during a meeting on one occasion); Bauder v. Wackenhut Corp., Civ. A. 99- 1232, 2000 WL 340191, at *4 (E.D.Pa. Mar. 23, 2000) (holding that a one time incident where supervisor grabbed plaintiff employee's behind

did not sufficiently support a hostile work environment claim).[10] Therefore, under the totality of the circumstances, I conclude that Allen's actions were not so pervasive or severe so as to alter a term of Bacone's employment.

B. Retaliation Claim

Defendant PHA moves for summary judgment on plaintiff's Title VII retaliation claim, contending that plaintiff has failed to establish a *prima facie* case. Additionally, PHA argues that even is plaintiff has established a *prima facie* case, PHA had a legitimate reason for reassigning Bacone to a desk job. Plaintiff responds that the legitimate reason for reassignment was pretextual.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, the Supreme Court created the basic framework and burdens of proof in Title VII pretext actions. First, the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence. Id. at 802. "To establish a prima facie case of retaliation, a plaintiff must show that: (1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action." Weston, 251 F.3d at 430.

If the plaintiff succeeds in establishing a *prima facie* case, the burden of production shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason' for its actions."

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[10] Notably, plaintiff cites only a single case where a plaintiff overcame a defendant's motion for summary judgment based on lack of severity or pervasiveness of the harassment. See Quantock, 312 F.3d at 904. Quantock is distinguishable from the present situation because in that case the Court of Appeals determined that "in light of [defendant's] significant position of authority at the company and the close working quarters within which he and [plaintiff] worked, a reasonable jury could find the sexual propositions sufficiently 'severe,' as an objective matter, to alter the terms of [plaintiff's] employment." Id.

Woodson v. Scott Paper Co.,109 F.3d 913, 920 n.2 (3d Cir. 1997), quoting McDonnell Douglas, 411 U.S. at 802. The Court of Appeals has recognized that the defendant's burden at this stage is relatively light and is satisfied if the defendant articulates any legitimate reason for the discharge. Id. The defendant need not prove that the articulated reason actually motivated the discharge. Id. "To prevail at trial, the plaintiff must convince the factfinder 'both that the reason was false, and that discrimination was the real reason.'" Id., quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 512 (1993).

A plaintiff cannot discredit the employer's proffered reason by showing only that the employer's decision was wrong or mistaken. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1997). "Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' . . . and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" Id. (internal citations omitted). The Court of Appeals has determined that "[w]hile this standard places a difficult burden on the plaintiff, 'it arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.'" Id., quoting Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1993).

Plaintiff has not established a *prima facie* case of retaliation. Assuming that reassignment from a patrol duty to a desk position constitutes an "adverse employment action,"[11] plaintiff has

[11] I note that it is undisputed that plaintiff has not suffered any loss in wages, benefits, or seniority. However, the Supreme Court has recognized that an adverse employment action constitutes "a significant change in employment status, such as hiring, firing, failing to promote,

failed to produce sufficient evidence under the third element to demonstrate that a causal connection existed between the filing of his hostile work environment claim and his reassignment to a desk job. In attempting establish this connection, plaintiff relies exclusively on temporal proximity: "[T]he timing of the adverse employment actions strongly suggest a causal link between [Bacone's] protected activity of filing a complaint with PHRC, the PHRC's decision to prosecute, and the adverse employment action of a transfer to a dead end job." (Pl.'s Br. in Opp'n. to Def.'s Mot. for Summ. J. at 46.) However, the Court of Appeals has recognized that "the mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997).

In Robinson, the Court of Appeals clarified when the timing of an alleged retaliatory action can, by itself, support a finding of causation. Id. , comparing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir.1989) (plaintiff "demonstrated the causal link . . . by the circumstance that the discharge followed rapidly, only two days later, upon Avdel's receipt of notice of [his] EEOC claim") with Delli Santi v. CNA Ins. Co., 88 F.3d 192, 199 n.10 (3d Cir.1996) ("timing alone will not suffice to prove retaliatory motive"). The Robinson Court held that timing alone could

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reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Plaintiff's brief appears to suggest that an earlier transfer to the North Division of the PHA's police force constituted a retaliatory action because it was a "known 'high crime' area." (Pl.'s Br. in Opp'n. to Def.'s Mot. for Summ. J. at 27.) Plaintiff cannot rely upon this transfer to a different patrol within the city as a retaliatory action because, unlike the reassignment to the desk position, working the same job as a patrol officer in a different section of the city did not alter his duties or responsibilities. See Burlington Indus. Inc., 524 U.S. at 761. Moreover it did not prevent Bacone from "doing the job he loved and was good at: apprehending criminals, saving lives, and advancing community relations with the PHA police department." (Pl.'s Br. in Opp'n. to Def.'s Mot. for Summ. J. at 44.)

not be used to establish causation where the adverse employment action did not immediately follow receipt of plaintiff's complaint. 120 F.3d at 1302.

In the present case, plaintiff admits that PHA became aware of Bacone's sexual harassment complaint in early October 1998 and the reassignment to the desk job occurred in February of 2000. The sixteen-month time span between PHA learning of the Bacone's sexual harassment complaint and the alleged retaliation is too long to constitute evidence of causation without more. See id. ("There is no evidence that the [adverse employment action] followed immediately upon [plaintiff's] complaint, so this is thus not one of the extraordinary cases where the plaintiff can demonstrate causation simply by pointing to the timing of the allegedly retaliatory action.").

C. Remaining State Claims

Title 28 U.S.C. § 1367(c)(3) authorizes a district court to dismiss supplemental state law claims if all of the claims over which it has original jurisdiction have been dismissed. "[W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendant state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." Hedges v. Musco, 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original), quoting Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995). Here, judicial economy, convenience and fairness do not require me to decide the pendant state claims. I will dismiss the remaining state law claims against PHA and Miller without prejudice.

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PHILADELPHIA HOUSING AUTHORITY, et al.	:	
	:	
	:	

ORDER

AND NOW, this day of May 2003, after considering defendants' motion for summary judgement and plaintiff's response thereto, the motion is GRANTED with respect to the Title VII claims. The remaining state law claims are DISMISSED without prejudice. Judgment is ENTERED in favor of defendants and against plaintiff on the Title VII claims.

THOMAS N. O'NEILL, JR., J.